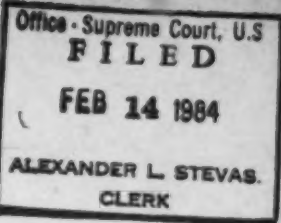


83 - 1349



No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

MAGNISEA FISHERIES, INC.,
a California corporation,

Petitioner,

vs.

OREGON OYSTER COMPANY,
an Oregon corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REINIS & FINK and
MITCHELL N. REINIS
By: MITCHELL N. REINIS
8500 Wilshire Blvd.
Suite 820
Beverly Hills, Ca. 90211
(213) 852-7020

Attorneys for Petitioner
Magnisea Fisheries, Inc.

QUESTION PRESENTED

In a diversity of citizenship action by one plaintiff against multiple defendants, where all claims arise out of the same or related transactions and complete diversity exists as against all defendants and the requisite amount in controversy exists as to all but one defendant, is it error for the District Court to exercise jurisdiction over all claims, including one claim which (arguably) does not satisfy the jurisdictional amount requirement?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Statutes and Rules	3
Statement of Case	6
Argument	9

I

It Was a Proper Exercise of
Discretion For The District
Court to Assume Jurisdiction
Over The Non-Tortious Claims
of Magnisea Against Oregon
Even if They Were (Arguably)
Below The Amount in Controversy .9

Index to Appendices

Appendix A. Judgment	App.1
Findings of Fact and Conclusions of LawApp.3
MemorandumApp.8
Order	App.12

TABLE OF AUTHORITIES

Cases	Page
<u>Ayala v. United States,</u> 550 F.2d 1196,1201(9th Cir.1977) 434 U.S. 814, 98 S.Ct. 50,54 L. Ed.2d 70(1977)	8,11,12
<u>Beautytuft v. Factory Insurance Association, 431 F.2d 1122,1128</u> (7th Cir.1970)	10
<u>Connecticut General Life Insurance Co. v. Craton, 405 F.2d 41,48</u> (5th Cir.1968)	10
<u>F.C. Stiles Contracting Co. v. Home Insurance Co., 431 F.2d 917,</u> 919(6th Cir.1970)	10
<u>Hatridge v. Aetna Casualty and Surety Co., 415 F.2d 809,816-817</u> (8th Cir.1969)	10
<u>Jacobson v. Atlantic City Hospital,</u> 392 F.2d 149,153(3rd Cir.1968)	10
<u>Libby, McNeill and Libby v. City National Bank, 592 F.2d 504,509,</u> 510(9th Cir.1978)	9
<u>Moor v. County of Alameda,</u> 411 U.S. 693,715, 93 S.Ct. 1785, 1799, 36 L.Ed.2d 596(1973)	13
<u>Stone v. Stone, 405 F.2d. 94,</u> 96-99(4th Cir.1968)	10
<u>United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct.</u> 1130, 16 L.Ed.2d 218(1966)	9

United States Code, Title 28
Sec. 1254(1) 3

United States Code, Title 28
Sec. 1332 3

United States Code, Title 28
Sec. 1603(a) 3

United States Code, Title 28
Sec. 1441 4

Federal Rules of Civil Procedure

Rule 20(a) 5

Rule 60 12

NO.
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

MAGNISEA FISHERIES, INC.,)
a California corporation,)
Petitioner,)
vs.)
OREGON OYSTER COMPANY,)
an Oregon corporation,)
Respondent.)

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Petitioner, Magnisea Fisheries, Inc.,
prays that a writ of certiorari issue to re-
view the judgment and opinion of the United
States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The judgment in favor of petitioner and findings of fact and conclusions of law of the United States District Court for the Central District of California are attached in Appendix A hereto as pp. 1-2 and 3-7 respectively. The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit vacating the district court decision and dismissing the action is attached in Appendix A hereto, pp. 8-11. The order of the Court of Appeals denying the petition(s) for rehearing is attached in Appendix A hereto, p. 12.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered in favor of Respondent/Appellant, Oregon Oyster Company, on October 19, 1982.

Timely Petitions for Rehearing by both parties were filed in the Court of Appeals on November 28, 1983. On December 27, 1983 the Court of Appeals denied "The petition for rehearing" without indicating the petition

to which it referred.

The jurisdiction of the Supreme Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND RULES

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between--

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the

United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim

to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insurer is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of

"business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

Rule 20(a) Federal Rules of Civil Procedure.

PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A

plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their ~~respective rights to relief, and against one~~ or more defendants according to their respective liabilities.

STATEMENT OF CASE

This entire case involves one shipment of shrimp from Petitioner, Magnisea Fisheries, Inc. (hereafter "Magnisea") in California to Respondent Oregon Oyster Company (hereafter "Oregon") in the State of Oregon.

Magnisea is in the business of importing and selling frozen seafood. In January, 1982, Magnisea received an order from Oregon for the purchase of thirty cases of shrimp for \$9600.00. The bill of lading shows delivery to Oregon on January 21, 1982. In opposition to a motion by Magnisea for summary judgment, Oregon admitted that the shrimp was received on January 21, 1982 at its premises by the agent of its broker, co-defendant Joe Setina.*

* Setina, an Oregon resident, was served with the complaint and defaulted.

On January 19, 1982, Magnisea invoiced Oregon for the shrimp. When Magnisea demanded payment by Oregon, it asserted that it had paid Setina by mistake and that it would not pay Magnisea. Thereafter Setina twice issued checks to Magnisea, but those checks were dishonored.

Magnisea sued Oregon and Setina* in one action. All defendants were residents and citizens of the State of Oregon. All defendants were sued on common counts and for contract breach for \$9600.00. The complaint contained two additional claims for misrepresentation and conversion, seeking punitive damages of \$50,000.00. Despite an allegation of agency among all defendants, the Court of Appeals (unlike the District Court) construed the conversion count as being "solely against defendant Setina".

As against Oregon, the case was decided in the District Court on a motion for summary

* Individually and with his wife as partners under a fictitious name, T.X. Western.

judgment. Magnisea was awarded judgment for \$9600.00 plus interest from date of breach.¹ The findings and conclusions show that the District Court determined that it had jurisdiction based upon diversity of citizenship and an amount in controversy in excess of \$10,000.00.

Oregon's opposition to the motion for summary judgment was filed so late that Magnisea's counsel did not receive it until the hearing date. The District Court denied said counsel's request for an opportunity to submit a reply.

In its brief on appeal, at oral argument, and again in its petition for rehearing, based on the procedure authorized in Ayala v. United States, 550 F.2d 1196, 1201 (9th Cir. 1977), Magnisea asked for leave to amend the complaint to make it clear that the tort counts lay against Oregon as well as Setina.* These requests were all ignored by the Court of Appeals without explanation or comment.

* Oregon's tardy opposition to the motion for summary judgment contained admissions from which it was clear that it had conspired with Setina to deny payment to Magnisea.

ARGUMENT

I

IT WAS A PROPER EXERCISE OF DISCRETION
FOR THE DISTRICT COURT TO ASSUME JURIS-
DICTION OVER THE NON-TORTIOUS CLAIMS
OF MAGNISEA AGAINST OREGON EVEN IF
THEY WERE (ARGUABLY) BELOW THE AMOUNT
IN CONTROVERSY

The decision of the Court of Appeals herein is an extension of the Ninth Circuit's rejection of the rule announced in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L.Ed. 218 (1966), allowing the district court to exercise discretion in determining whether to adjudicate joined non-federal claims based upon criteria such as judicial economy, avoidance of multiplicity of suits, convenience and fairness to litigants. Thus, the opinion herein is based upon "a strong public policy against such pendent party jurisdiction in the Ninth Circuit." Libby, McNeill and Libby v. City National Bank, 592 F.2d 504, 509-510 (9th Cir. 1978).

Virtually every other circuit has reached a result contrary to the present decision. See e.g., Hatridge v. Aetna Casualty and Surety Co. 415 F.2d 809,816-817(8th Cir.1969); F.C. Stiles Contracting Co. v. Home Insurance Co., 431 F.2d 917,919(6th Cir.1970); Beautytuft v. Factory Insurance Association, 431 F.2d 1122,1128(7th Cir.1970); Connecticut General Life Insurance Co. v. Craton, 405 F.2d 41,48(5th Cir.1968); Stone v. Stone, 405 F.2d 94,96-99(4th Cir.1968); and Jacobson v. Atlantic City Hospital, 392 F.2d 149,153(3rd Cir.1968). This reasoning of the Court in the Beautytuft case is typical:

"As to all of the insurance company defendants, there is clearly the diversity of citizenship required by 28 U.S.C. § 1332(1964). As to 34 of the defendants the amount claimed is in excess of the \$10,000 jurisdictional figure set in § 1332. As to 24 of the defendants, however, the contractual liability is less than \$10,000 if the claims are not

accumulated, and appellants insist that as to these 24 defendants the District Court has no jurisdiction.

"As we have noted, this litigation is properly before the court as to 34 defendants without any need to consider the accumulation of the claims. As to the 24 defendants with lesser limits on their liability, the claims arise out of the same transaction and the proofs required (except as to amount of liability) are identical in every respect. Clearly, in the interest of avoiding sheer waste of court time, these claims should be tried together. We believe the District Judge was entirely correct in asserting pendent jurisdiction as to the 24 defendants."

Seven years ago, this Court granted certiorari in a Ninth Circuit case raising some of these issues, Ayala v. United States,

550 F.2d 1196 (9th Cir.1977), 434 U.S. 814, 98 S.Ct. 50, 54 L.Ed.2d 70 (1977). While Ayala was pending, the petitioner therein made a motion to reopen and supplement the record.

434 U.S. 1058, 90 S.Ct. 1227, 55 L.Ed.2d 751 (1978). Following the granting of the motion, the writ of certiorari was dismissed under FRCP 60. 435 U.S. 814, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978). Thus, no re-examination by this Court of Ayala was forthcoming.

There is a combination of factors present in this case which distinguishes it from the earlier cases in which jurisdiction was refused and which make this an extension of the Ninth Circuit position. These factors include the fact that there is only one plaintiff, it is not a class action, the transactional nexus between the parties and claims is easily satisfied, complete diversity exists, no governmental body is a party to any claim, no federal claim is involved, the district court found that it had jurisdiction and the court of appeals denied the right to amend the complaint

to clarify the jurisdictional base. We have not found any case, even in the Ninth Circuit, in which jurisdiction has been denied under these circumstances.

It is submitted that certiorari should again be granted to resolve the conflict in the circuits and to provide clear guidance on this "subtle and complex question with far-reaching implications." Moor v. County of Alameda, 411 U.S. 693, 715, 93 S.Ct. 1785, 1799, 36 L.Ed.2d 596 (1973).

DATED: February 7, 1984.

Respectfully submitted,

REINIS AND FINK and

MITCHELL N. REINIS

By


MITCHELL N. REINIS

APPENDIX "A"

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT
OF CALIFORNIA.

MAGNISEA FISHERIES, INC., a California
corporation, Plaintiff vs. OREGON OYSTER
COMPANY, a corporation dba OYSTER BAR. JOE D.

SETINA & JOY M. SETINA, individually and dba
T.X. WESTERN, Defendants, No. CV 82-2892-R
JUDGMENT. LODGED: September 1, 1982; FILED:
October 18, 1982; ENTERED: October 19, 1982.

This action came on for hearing on motion of
plaintiff for summary judgment before the Court,
the Honorable Manuel L. Real, District Judge,
presiding, and the issues having been duly
heard and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED as
follows: 1. Plaintiff Magnisea Fisheries,
Inc., shall recover of the defendant Oregon
Oyster Company on plaintiff's first three
claims the sum of \$9600.00 with interest there-
on from January 21, 1981, at the rate of seven
percent (7%). 2. Defendant Oregon Oyster
Company shall pay to plaintiff the sum of
\$ _____ for plaintiff's costs
of suit herein incurred.

DATED: This ____ day of _____, 1982.

/s/ MANUEL L. REAL

United States District Judge

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT
OF CALIFORNIA.

MAGNISEA FISHERIES, INC., a California corporation, Plaintiff vs. OREGON OYSTER COMPANY, a corporation dba OYSTER BAR, JOE D. SETINA & JOY M. SETINA, individually and dba T.X. WESTERN, Defendants. No. CV 82-2892-R. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for hearing on the motion of plaintiff Magnisea Fisheries Inc. for summary judgment on October 4, 1982, before the Honorable Manuel L. Real, United States District Judge. Plaintiff Magnisea Fisheries, Inc. was represented by Reinis & Fink, by Mitchell N. Reinis and defendant Oregon Oyster Company was represented by Marvin M. Chesebro, Esq. No appearance was made by or on behalf of the other defendants. The matter having been presented by affidavit, argued and submitted, the Court hereby finds and concludes as follows: FINDINGS OF FACT

The Court finds: 1. Defendant Oregon Oyster Company is an Oregon corporation with its

principal place of business in Oregon. It is engaged in business under the name "Oyster Bar."

2. Plaintiff, Magnisea Fisheries, Inc., is a corporation duly organized under and by virtue of the laws of the State of California, and has its principal place of business in said State.

3. In doing the acts complained of by plaintiff, each of the defendants was the agent of the other defendants and was acting within the course and scope of such agency. 4. The amount in controversy as between plaintiff and all defendants is in excess of \$10,000.00. 5. On or about January 19, 1981, defendant Oregon Oyster Company agreed to purchase from the plaintiff thirty (30) cases of shrimp for the reasonable value of \$9600.00. 6. On or about January 21, 1981, defendants received and accepted the said shrimp from plaintiff. 7. At no time did defendant Oregon Oyster Company, as consideration for the shrimp, pay plaintiff the sum of \$9600.00 or any other sum. 8. As a proximate result of said defendant's non-payment, plaintiff has been damaged in the sum of \$9600 together with interest thereon from January 21,

1981. 9. Plaintiff performed all obligations and conditions required on its part to be performed. 10. An account exists between the parties. Defendant Oregon Oyster Company owes plaintiff on its second claim the sum of \$9600 for shrimp sold by plaintiff to defendant. 11. On or about January 19, 1981, defendant Oregon Oyster Company entered into an oral contract with plaintiff whereby said defendant promised to pay the sum of \$9600 upon delivery of thirty (30) cases of shrimp. 12. Subsequent to January 19, 1981, defendant Oregon Oyster Company breached said oral agreement by failing to pay plaintiff for the shrimp. 13. The Court further finds in all respects as hereinafter set forth in the Conclusions of Law.

CONCLUSION OF LAW. The Court concludes:

1. In all respects as set forth in the foregoing Findings of Fact. 2. Said Findings having been made upon issues which are determinative of this action, any further Findings or Findings upon issues other than those embraced in the foregoing Findings would be immaterial and are not made for that reason.

3. The Court has jurisdiction of this action on the basis of diversity of citizenship of the parties. 4. Venue of these actions is properly laid in this District. 5. An account exists between the plaintiff and defendant Oregon

Oyster Company wherein and whereby said defendant owes plaintiff the sum of \$9600 for shrimp sold by plaintiff to said defendant on or about January 21, 1981. 6. On or about January 21, 1981, defendant Oregon Oyster Company became indebted to plaintiff in the sum of \$9600 for the reasonable value of shrimp sold and delivered by plaintiff to said defendant at defendant's request. 7. On or about January 19, 1981, defendant Oregon Oyster Co. entered into an oral contract with plaintiff whereby plaintiff was to and did sell and deliver thirty (30) cases of shrimp to said defendant on January 21, 1981, and said defendant was to pay plaintiff therefor the sum of \$9600. 8. Defendant Oregon Oyster Company breached said contract by failing to pay plaintiff \$9600. for the shrimp. 9. Plaintiff performed all obligations and conditions on its part to be performed.

10. As a proximate result of defendant Oregon Oyster Company's non-payment, plaintiff was damaged in the sum of \$9600, together with interest thereon from January 21, 1981. 11. Judgment is ordered entered in favor of plaintiff in accordance with the foregoing. Plaintiff shall recover its taxable costs herein incurred.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: On this ____ day of _____, 1982.

/s/ MANUEL L. REAL, United States District Judge.

IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT.

MAGNISEA FISHERIES, INC., a California corporation, Plaintiff/Appellee, vs. OREGON
OYSTER COMPANY, Defendant/Appellant. CA No.

82-6010; DC No. DV 82-2892-R. MEMORANDUM. **

Argued and Submitted-October 6, 1983. Appeal
from the United States District Court for the
Central District of California The Honorable
Manuel L. Real, District Judge, President
Before: SKOPIL and PREGERSON, Circuit Judges,
and MARQUEZ*, District Judge

Oregon Oyster Company (OOC) appeals from a
judgment of the district court which granted
summary judgment in favor of Magnisea Fisheries,
Inc. (Magnisea).

* The Honorable Alfredo C. Marquez, United
States District Judge for the District of
Arizona, sitting by designation.

** The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that the disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

Magnisea sold thirty cases of shrimp for the total price of \$9600. The shrimp was delivered to OOC. OOC paid \$9600 to Mr. Setina (Setina), a fish broker, for the shrimp. Setina issued checks to Magnisea in payment of the shrimp. These checks were dishonored for insufficient funds.

Magnisea filed suit in district court against both Setina and OOC. Jurisdiction was based on diversity pursuant to 28 U.S.C. § 1332. The complaint pleaded five alternative theories to recover the \$9600 value of the shrimp. In Count Four Magnisea pleaded a conversion theory solely against defendant Setina and sought \$50,000 in punitive damages. In all other counts the total damage amount sought was \$9600.

In diversity actions the plaintiff must satisfy the \$10,000 jurisdictional requirement with regard to each defendant unless the plaintiff's claim against the defendants are common and undivided so that the defendants' liability is joint and not several. Welker v. Metropolitan Life Ins. Co., 502 F.Supp. 268,271

(C.D. Calif. 1980); Libby, McNeill and Libby v. City National Bank, 592 F.2d 504,509-10 (9th Cir.1978).

Magnisea satisfied the jurisdictional amount requirement only in Count Four. It is axiomatic that OOC cannot be jointly liable for a conversion which was not pleaded against it. Nor can Magnisea use the jurisdictional amount of Count Four to bootstrap into federal court those claims against OOC which do not satisfy the jurisdictional amount. There is a strong public policy against such pendent party jurisdiction in the Ninth Circuit. Libby, McNeill and Libby, supra.

The Court of Appeals is required to consider independently the question of jurisdiction and dismiss on its own motion if jurisdiction is lacking. C. & C. M. Ry. v. Swan, 4 S.Ct. 510 (1884); Jones v. Perrigan, 459 F.2d 81(6th Cir. 1972). This same duty applies equally to the jurisdictional amount requirement. Batts Restaurant, Inc. v. Commercial Ins. Co. of Newark, 406 F.2d 118(7th Cir.1969).

In accordance with above, the district court decision is vacated and the suit is dismissed for lack of jurisdiction.

IN THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

OREGON OYSTER COMPANY, Appellant, vs. MAGNI-
SEA FISHERIES, INC., a California corporation,
Appellee. CA No. 82-6010; DC No. CV 82-2892-R
ORDER.

Appeal from the United States District Court
for the Central District of California. The
Honorable Manuel L. Real, District Judge,
Presiding Before: SKOPIL and PREGERSON, Circuit
Judges, and MARQUEZ, District Judge.*

The panel has voted to deny the petition for
rehearing.

The petition for rehearing is denied.

* The Honorable Alfredo C. Marquez, United
States District Judge for the District of
Arizona, sitting by designation.